Supreme Court, U.S.
FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1441

In the Supreme Court of the United States

October Term, 1989

INNOTRON DIAGNOSTICS,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

THE NINTH CIRCUIT'S LINE OF DECISIONS HOLDING THAT NO CLAIM FOR MONOPOLIZATION CAN BE STATED UNDER SECTION 2 IF BASED ON "TYING CONDUCT" WHICH IS NOT PER SE VIOLATIVE UNDER SECTION 1 OF THE SHERMAN ACT CREATES A CONFLICT AMONG THE CIRCUITS

Contrary to Respondent's contention, the Ninth Circuit's decision that no claim can be stated for monopolization under § 2 if the conduct does not rise to the level of coercion required for per se unlawful

tying arrangements under § 1 cannot be reconciled with decisions of the Third and Seventh Circuits. Respondent's effort to distinguish the Third Circuit's decision in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978), and the Seventh Circuit's decision in *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir.), *cert. denied*, 439 U.S. 822 (1978), lacks any analytical foundation.

Respondent states that the decisions of the Third and Seventh Circuits found § 2 violations based on monopoly leveraging, which it argues is conduct distinct from tying. But tying is simply a form of monopoly leveraging. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The only difference between tying and leveraging is the coercion element. To qualify as per se unlawful tying under § 1, the defendant must use a degree of market power in the tying product to coerce customers in the downstream, tied product market. In contrast, monopoly leveraging under § 2 requires only that the defendant use monopoly power in one market in a way that is unreasonably restrictive of competition in the second market. Therefore, conduct that does not rise to the level of coercion required for tying under § 1 may nevertheless constitute leveraging under § 2. Respondent's (and the Ninth Circuit's) suggestion that "tying" allegations cannot also constitute a leveraging offense is simply incorrect.

Nor is Innotron required to prove monopoly leveraging in order to establish an offense under § 2. In this case, Abbott inserted a prohibition on the use of competitors' reagents in its TDx machine rental contracts for the purpose of maintaining its monopoly

in the reagent market. This violates § 2 irrespective of whether it also constitutes monopoly leveraging. Abbott moved for summary judgment on this § 2 claim based solely on its argument that monopolization requires the same showing of coercion as that required for per se tying arrangements. The Ninth Circuit's acceptance of this argument squarely conflicts with the Third Circuit's decision in *SmithKline*. In *SmithKline*, the court held that while the defendant's pricing scheme was not coercive and did not constitute a tie, it nonetheless was unreasonably restrictive of competition in the market in violation of § 2.

This difference in the degree of exclusionary conduct required for tying under § 1 and monopolization under § 2 is well founded. Once coercion and the other requisite elements of per se unlawful tying are established, anticompetitive effect is presumed and the defendant has only limited defenses. Section 2, by contrast, requires a complete analysis of the pro- and anticompetitive effects of the conduct at issue. The Third and Seventh Circuits have recognized this qualitative distinction and have held that a plaintiff who cannot meet the more stringent coercion standard for per se unlawful conduct under § 1 may prevail by showing an unreasonable restriction of competition under § 2. The Ninth Circuit, as exemplified by the decision below, has stubbornly refused to recognize any distinction between § 1 and § 2. This Court should grant Innotron's petition for certiorari to reconcile this conflict.

II

NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT RULED THAT THE PETITIONER COULD NOT WIN A TIE-IN CLAIM TRIED UNDER THE RULE OF REASON

Here, respondent does a polite curtsy and seeks to "palm off" on petitioner what is, in truth, its burden. In making a motion for summary judgment, the obligation is on the moving party to "demonstrate the absence of a genuine issue of material fact." *Celotex Corporation v. Catrett,* 477 U.S. 317, 323 (1986). As Justice White stated even more pointedly in his concurring opinion in that case "[i]t is the defendant's task to negate, if he can, the claimed basis for the suit." *Id.* at 327. Now defendant suggests that it was Petitioner's obligation to *create* a genuine issue of material fact. Wrong! If, in fact, Abbott moved for summary judgment on Innotron's *entire* claim, but did so only on the basis that the coercion element, applicable to the *per se* analysis, was absent, then it failed to meet its burden of proving the absence of a genuine issue of material fact, namely, whether the express prohibition on buying competitive reagents was unreasonably anticompetitive under a rule of reason test. Clearly, Innotron, by laying out the totality of the factual basis of its case, satisfied the *Celotex* requirement of setting forth "specific facts showing that there is a genuine issue for trial" under a Section 1 rule of reason analysis. *Id.* at 324. It is Abbott, therefore, who failed to satisfy its burden.

The uncertainty in allocating the burden of proof with respect to negating or establishing a material issue of

fact is itself an issue warranting clarification by this Court.

III

THIS COURT SHOULD CLARIFY THAT SUMMARY JUDGMENT CANNOT BE GRANTED WHERE THE TOTALITY OF THE FACTS PERMITS REASONABLE COMPETING INFERENCES

Respondents do not respond to our argument that the Ninth Circuit decision has ignored this Court's admonition in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that the resolution of competing factual inferences is appropriately left to the trier of fact. Respondent's argument that the Ninth Circuit found that an inference of coercion from the totality of facts would be "unreasonable" misses the point. What the Ninth Circuit said was ". . . two pieces of evidence are susceptible to inferences *besides* coercion . . . price increases *could* . . . be a legitimate attempt to maximize profits in the tying product market . . . and the decline in placements *could* have reflected saturation in the large hospital market." (Appendix A to Petition at 2) (emphasis added.) In short, the Ninth Circuit found the facts did permit an inference of coercion, but that other inferences could also be drawn.

This Court needs, we respectfully submit, to define, what an "unreasonable" inference is. An unreasonable inference is one which is not permissible in the first instance, *e.g.*, facts A, B and C taken together do not permit the reasonable inference that fact D occurred. That is *not* what the Ninth Circuit ruled. It acknowledged that the evidence permitted an inference of coercion. The panel held only that it found the innocent inferences more persuasive.

What the Ninth Circuit did, under the *guise* of declaring the inference of coercion to be unreasonable, was weigh the evidence and come to a conclusion as to what *it* believed to be the better or more appropriate inference. That weighing process is impermissible and beyond the scope of summary judgment. This is particularly true where, as here, the inferences of coercion were supported by direct testimony from the defendant's own employees and customers. The Ninth Circuit flagrantly abused the summary judgment process, and it exhibited an indifference toward this Court's cautionary admonition in *Anderson v. Liberty Lobby*. Such excesses are becoming all too commonplace. We urge this court to exhort lower Courts to avoid acting as juries.

CONCLUSION

The Ninth Circuit's decision reflects the lengths to which the standards for granting summary judgment may be abused. We urge this Court to grant review and, in addition to resolving a circuit conflict on a significant substantive antitrust issue, to clarify, with emphasis, its concern for the well being of the jury system and

particularly its concern that important, factually based antitrust cases should not be routinely disposed of summarily.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 30, 1990, I served the within *Reply Brief in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 30, 1990, at Los Angeles, California.

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(Original signed)